No. 86-59

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1986

ENRIQUE JESUS OSORNO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the admission against Pelaes of evidence of his statement, made while he was incarcerated, to a similarly incarcerated convicted coconspirator, violated the petitioner's rights under the Sixth Amendment to the United States Constitution.

2. Whether there was sufficient evidence to justify conviction of the petitioner on the grounds of violating 18 U.S.C. § 1201(a)(1) (1982), and 18 U.S.C. § 1201(c) (1982). The petitioner was convicted of one count of kidnapping and one count of conspiring to kidnap.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were as follows:

1. United States of America, Appellee.

2. Francisco C. Pelaes and Enrique Jesus Osorno, Defendants-Appellants.

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No.

In The

Supreme Court of the United States

October Term, 1986

ENRIQUE JESUS OSORNO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Enrique Jesus Osorno prays that a writ of certiorari issue to review a final order of the United States Court of Appeals for the Second Circuit, upholding petitioner's convictions for one count of kidnapping and conspiring to kidnap.

OPINION BELOW

The May 12, 1986 opinion of the United States Court of Appeals for the Second Circuit, as yet unreported, appears at Appendix A, infra, pp. 1a-14a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (14a) was entered on May 12, 1986. It is final by its terms. The jurisdiction of this Court is invoked under the Rules for the Supreme Court of the United States, Rule 17(1)(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense."

The statute describing situations where a defendant may seek a writ of certiorari, Rule 17(1)(c) of the Rules for the Supreme Court of the United States, provides in pertinent part as follows:

> "When a . . . federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court . . ."

STATEMENT OF THE CASE

On July 11, 1985, after trial before the Honorable Whitman Knapp, United States District Court judge, and a jury, petitioner was convicted on one count of kidnapping and one count of conspiring to kidnap. Petitioner then petitioned for an appeal based on the grounds: the statement of Lastre-Parrada, a fellow detainee of the petitioner who was working with the government, was allowed in evidence in violation of the petitioner's Sixth Amendment rights to assistance of counsel and; there was insufficient evidence to warrant convictions of the petitioner for the aforementioned violations.

The Court of Appeals for the Second Circuit held: that petitioner Osorno's Sixth Amendment rights to counsel were not violated in the present case; and that the evidence was sufficient to support the conviction of the petitioner on all counts.

REASONS FOR GRANTING THE WRIT

Here, as in *United States v. Henry*, 447 U.S. 264 (1979), there is squarely raised the question whether the statements made by a defendant to a coconspirator, working with the government, can be admitted into evidence when the taking of said statement was done without the speaker's attorney being present. In the recent case of *United States v. Cruz*, 785 F.2d 399 (2d Cir. 1986), the court rejected a defendant's claim that his Sixth Amendment rights had been violated in the use of statements elicited by a cooperating fellow inmate of the appellant. This important issue should be decided by this Court to determine whether these statements have been obtained, and used, in violation of the petitioner's rights to assistance of counsel as mandated by the Sixth Amendment, and as outlined in *Massiah v. United States*, 377 U.S. 201, 206 (1964).

Petitioner contends that allowing the statement of a government agent (Lastre-Parrada) to be used as evidence was a serious violation of the petitioner's Sixth Amendment rights and that this evidence unduly prejudiced the defense of the petitioner in the instant matter.

In criminal prosecutions the burden is on the People to prove every element of the crime beyond a reasonable doubt. The Court of Appeals for the Second Circuit (11a) stated that there is a heavy burden placed on defendants who claim that they were convicted by insufficient evidence. Petitioner states that he has met this burden by showing that they were convicted based on evidence which appropriately should have been considered only as it related to the other codefendants. Petitioner states that there are no available facts, properly on the record, to sustain his conviction for either kidnapping or conspiring to kidnap.

The disparity of evidence adduced as between the petitioner Osorno and the codefendants, was so extensive as to render a jury unable to compartmentalize the evidence concerning Osorno. *United States v. Messino*, 602 F. Supp. 783 (D.C.N.Y. 1985). This resulted in compelling actual prejudice against the petitioner, which requires this Court to reverse the conviction herein. *United States v. Weisman*, 621 F. 2d 1118, *cert. denied*, 101 S. Ct. 209, 449 U.S. 871, 66 L. Ed. 91 (2d Cir. 1980).

CONCLUSION

For the foregoing reasons, as well as any additional reasons presented by other parties who may seek certiorari to review the Second Circuit's decision, the petition for certiorari should be granted.

Respectfully submitted,

LAWRENCE S. KERBEN
Attorney for Petitioner

FREDERICK SELIGMAN
Of Counsel

APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 511, 617—August Term, 1985

(Argued: December 17, 1985 Decided: May 12, 1986)

Docket Nos. 85-1259, -1262 (-1258L)

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANCISCO C. PELAES and ENRIQUE JESUS OSORNO,

Defendants-Appellants.

Before:

OAKES, KEARSE, and PIERCE,

Circuit Judges.

Appeals from judgments of the United States District Court for the Southern District of New York, Whitman Knapp, *Judge*, convicting each defendant on one count of

kidnaping and one count of conspiring to kidnap, in violation of 18 U.S.C. §§ 1201(a)(1) and (c).

Affirmed.

MICHAEL KELLOGG, Assistant United States Attorney, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Warren Neil Eggleston, Assistant United States Attorney, New York, New York, on the brief), *for Appellee.*

B. ALAN SEIDLER, Tappan, New York, *for Defendant-Appellant Francisco C. Pelaes.*

LAWRENCE S. KERBEN, New York, New York (Gary J. Englert, New York, New York, on the brief), *for Defendant-Appellant Enrique Jesus Osorno.*

KEARSE, *Circuit Judge*:

Defendants Francisco C. Pelaes and Enrique Jesus Osorno appeal from judgments entered in the United States District Court for the Southern District of New York, entered after their retrial before a jury and Whitman Knapp, *Judge*, convicting them on one count of kidnaping 11-year-old Luis Almeida ("Luis") and trans-

porting him in interstate commerce, in violation of 18 U.S.C. § 1201(a)(1) (1982), and one count of conspiring to commit those acts, in violation of 18 U.S.C. § 1201(c) (1982). Judgments of conviction entered after the first trial of these defendants and others on the same charges were set aside on appeal principally on the ground that the trial court had unduly restricted defendants' presentation of their theory of defense. *See United States v. Pedroza*, 750 F.2d 187 (2d Cir. 1984) ("*Pedroza*"). The principal arguments advanced on this appeal are that the evidence was insufficient to support defendants' convictions and that the admission against Pelaes of evidence of his statement, made while he was incarcerated, to a similarly incarcerated convicted coconspirator, violated Pelaes's Sixth Amendment right to counsel. For the reasons below, we affirm the judgments of conviction.

I. BACKGROUND

The sequence of events leading to the present prosecution, reflected by the evidence presented at both trials, was fully described in our opinion in *Pedroza*. Except to the extent necessary for discussion of defendants' specific contentions on this appeal, the evidence presented at the retrial, taken in the light most favorable to the government, will be but briefly summarized here.

In November 1983, Pelaes, Angel Lastre-Parrada, and two others intercepted Luis at gunpoint as he left his house in Los Angeles, California, and kept him at various locations in Los Angeles and New York for some three weeks. Luis was recaptured in New York by agents of the Federal Bureau of Investigation ("FBI").

Appendix A

The theory of the prosecution was that the kidnaping of Luis was narcotics-related. Osorno had sold ten kilograms of cocaine, on consignment, to one Ramon Antonio Serrano. On the recommendation of Luis's uncle, Jose Alfredo Almeida ("Freddy"), Serrano had entrusted most of this cocaine to Freddy's father-in-law, Victor Jimenez for safekeeping. Thereafter, the cocaine was seized by the police, and Jimenez disappeared. Serrano, who apparently did not believe Freddy's report of the seizure, attempted to find Jimenez; Osorno, who apparently had not been paid for the cocaine, attempted to find Serrano.

The government sought to prove that Pelaes and others, hired by Serrano to help recover the cocaine, had kidnaped Luis in order to coerce Freddy to disclose Jimenez's whereabouts or to cause the return of the cocaine. It presented the testimony of, *inter alios*, Luis, his parents, and Freddy, and the testimony of Lastre-Parrada, who had pleaded guilty to the kidnaping charges and agreed to cooperate with the government. Lastre-Parrada testified not only to the details of the kidnaping, including the roles played by Pelaes and Osorno, but also to the fact that Pelaes, while awaiting retrial, had asked Lastre-Parrada to testify falsely in support of Pelaes's trial contentions.

Pelaes's contention at trial was that the abductors of Luis had lacked the intent necessary to be guilty of kidnaping because they had been led by Serrano to believe that Luis's father had voluntarily given Luis to them as "security" for the return of or payment for the missing cocaine. Serrano, who also had pleaded guilty to the kidnaping charges, testified for defendants in support of

this contention. Serrano testified that the purchase of the cocaine on credit had been engineered by Luis's father.

The jury found both defendants guilty on both the kidnaping and the conspiracy to kidnap counts. Pelaes was sentenced to 18 years' imprisonment on each count, to be served concurrently. Osorno was sentenced to 12 years' imprisonment on each count, to be served concurrently. These appeals followed.

II. DISCUSSION

On appeal, Pelaes contends principally (1) that the admission of his statement, made while he was incarcerated and awaiting retrial, to Lastre-Parrada, who was incarcerated in proximity to him, violated his Sixth Amendment right to counsel, (2) that the court erred in admitting against him evidence of the cocaine transaction between Osorno and Serrano, and (3) that the evidence at trial was insufficient to convict him on the conspiracy count. Osorno contends principally that the evidence was insufficient to support his conviction on either count. We have considered these contentions, as well as defendants' other contentions, and find no basis for reversal. Only those listed above warrant discussion.

A. *Admissibility of Pelaes's Statement to Lastre-Parrada*

At trial, Lastre-Parrada not only testified to his own and Pelaes's involvement in the kidnaping of Luis, but also testified that shortly before the retrial, while they both were incarcerated in the Manhattan Correctional Center ("MCC"), Pelaes had urged Lastre-Parrada not to give testimony that would incriminate Pelaes but

instead to support Pelaes's contention that Luis's father had consented to the taking of Luis as security for the return of the cocaine. Relying on *United States v. Henry*, 447 U.S. 264 (1980), Pelaes contends that the admission of this statement violated his Sixth Amendment right to counsel under *Massiah v. United States*, 377 U.S. 201, 206 (1964) (accused denied Sixth Amendment protections "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him"). *See Wilson v. Henderson*, 742 F.2d 741, 744-45 (2d Cir. 1984), *cert. granted*, 105 S. Ct. 3499 (1985). The district court, after conducting a brief evidentiary hearing, found *Henry* inapposite because the government had neither sought to have Lastre-Parrada solicit statements from Pelaes nor sought to have Lastre-Parrada placed in proximity to Pelaes in order to gather unsolicited statements. We agree with the district court.

In *Henry*, the defendant was arrested on federal bank robbery charges and, pending trial, was confined in a city jail where one Nichols, who had been a paid government informant on a contingent fee basis for more than a year, was also incarcerated. Nichols advised an FBI agent that he was housed in the same cellblock with several federal prisoners, including Henry. The agent told Nichols not to initiate any conversation with or question Henry regarding the bank robbery, but to be alert to any statements made by Henry. After Nichols was released from jail, the agent contacted him and learned of several self-incriminating statements made by Henry, which were later used at Henry's trial. The Supreme Court ruled that this combination of circumstances was sufficient to support the view that Nichols had deliberately used his

position to secure incriminating statements from Henry when Henry's counsel was not present and that that conduct was attributable to the government. The Court stated that "[e]ven if the agent's statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result." *Id.* at 271. It concluded that

> [b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel. This is not a case where, in Justice Cardozo's words, "the constable . . . blundered," . . . ; rather, it is one where the "constable" planned an impermissible interference with the right to the assistance of counsel.

Id. at 274-75 (citation and footnotes omitted).

The finding of the trial court that there was no such intentional interference in the present case is not clearly erroneous. Lastre-Parrada testified that about one week after he had been sentenced to 15 years' imprisonment upon his plea of guilty to the kidnaping and conspiracy offenses, he had asked the wife of a fellow inmate to inform his attorney that he was willing to testify for the government. About a month later he was transferred to another prison, where he remained for several weeks, and was then brought back to MCC. It was shortly after his return to MCC that he was importuned by Pelaes to support Pelaes's version of the events. He did not hear from his attorney until after this conversation with Pelaes.

Although the record remained unclear as to whether, prior to Pelaes's statement to him, Lastre-Parrada had succeeded in communicating to his attorney or the government his willingness to cooperate, it was clear that the government brought Lastre-Parrada back to the MCC in order to explore with him the possibility of his cooperation. In so doing, however, the Assistant United States Attorney ("AUSA") in charge, Michael Kellogg, took certain steps in an attempt to avoid the possibility that Lastre-Parrada would be in proximity to his codefendants who awaited retrial. Kellogg testified that, first, he telephoned MCC and "alerted them to the fact that Mr. Lastre would be coming in and that he could not be housed in proximity to or have any contact with" the codefendants awaiting retrial. Then he wrote a letter to the person he had spoken with, reiterating these instructions. He then telephoned again to make sure that the letter had been received and that Lastre-Parrada would be housed apart from the other codefendants. He was given assurance that MCC officials understood that Lastre-Parrada should be segregated from the other codefendants.

Notwithstanding Kellogg's efforts, MCC officials placed Lastre-Parrada on the same floor on which Pelaes and another codefendant awaiting retrial were housed. Their conversation occurred on the first or second evening that Lastre-Parrada was there. Lastre-Parrada did not confer with the AUSA until the day following this conversation, which was the first that Kellogg knew that his efforts to have Lastre-Parrada segregated from the other codefendants had failed.

In the circumstances, we find no error in the district court's ruling that the government did not intentionally

create a situation likely to induce Pelaes to make incriminating statements without the assistance of counsel. The AUSA did all that could reasonably have been expected of him to avoid the creation of such a situation.

In ruling that Pelaes's Sixth Amendment rights were not violated in the present case, however, we note that this is not the first incident of its kind, and we caution the government that it is the responsibility of the United States Government, not just of the United States Attorneys, to see that the rights of a defendant are not infringed. In *United States v. Cruz*, 785 F.2d 399 (2d Cir. 1986), we rejected, as we have here, a defendant's claim that his Sixth Amendment rights had been violated by the elicitation of statements from him by a cooperating fellow inmate housed on the same floor of MCC as the defendant. *See also United States v. Calder*, 641 F.2d 76, 78-79 (2d Cir.), *cert. denied*, 451 U.S. 912 (1981). In *Cruz* we upheld the district court's

> express finding that the Government did *not* deliberately seek to elicit information from Cruz by putting him on the same floor as Tuli in the MCC, however odd a coincidence it seems, especially in view of the fact that Tuli was already a government informant and Mojica turned out subsequently to be willing to cooperate with the Government.

Id. at 408 (emphasis in original). Yesterday's "odd . . . coincidence" was repeated here, notwithstanding the exemplary efforts of the AUSA to anticipate and avoid it. We trust that it will not be repeated again. Although the "blunder" in this case was that of the Bureau of Prisons, which operates MCC, we note that both the United States Attorneys and the Bureau of Prisons are under the aegis

of the United States Attorney General, and that such lapses of coordination should be easily avoidable. If they are not avoided, the courts will be justified in viewing with considerable skepticism further "accidental" placements of cooperating informants near indicted defendants.

B. *The Admissibility of the Antecedent Cocaine Transaction*

Pelaes also contends that the trial court erred in admitting in evidence against him proof of the alleged cocaine transaction that underlay the abduction of Luis. He contends that since he had no role in that transaction and no interest in the cocaine, the probative value of this evidence to show the motive for the kidnaping was outweighed by its prejudicial effect on him, and the trial court therefore could not properly admit it. We disagree.

This argument was made before us in *Pedroza* and we rejected it, noting that the evidence was relevant to defendants' motive for the abduction of Luis, and concluding that it was not an abuse of discretion for the trial court to conclude that "some detail as to the events involving the cocaine was necessary to the jury's understanding of, for example, whether a kidnapping was intended, why a kidnapping might have been thought desirable, and why the person abducted was Luis." 750 F.2d at 201. We have been given no reason to alter that view.

We also stated in *Pedroza* that since there was no indication that Pelaes or most of the other defendants had been involved in the cocaine transaction, those defendants were entitled to a clearly limiting instruction stating

"not only that the defendants [were] not being tried for violations of the narcotics laws, but also that there was no evidence that [they] participated in those antecedent events." *Id.* The court at retrial gave the required instruction as to the limited purpose for which the jury was allowed to consider the antecedent narcotics transaction, and we find no error in the admission of this evidence.

C. *The Sufficiency of the Evidence*

Pelaes contends that the evidence was insufficient to support his conviction on the conspiracy count; Osorno contends that the evidence was insufficient to support his conviction on either count. We reject these contentions.

As we stated in *Pedroza*,

> [i]t is well settled that a defendant who contends that the evidence was insufficient to convict him bears a very heavy burden. . . . In considering such a contention, the " ' "pieces of evidence must be viewed not in isolation but in conjunction," ' ". . .; we must view the evidence in the light most favorable to the government, . . . and we must draw all permissible inferences in its favor . . . .

750 F.2d at 198 (citations omitted). Where there are conflicts in the testimony, we must give deference to the jury's assessment of the credibility of the witnesses and to its selection between competing inferences. *E.g.*, *United States v. LeRoy*, 687 F.2d 610, 616 (2d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983). Neither defendant here carries his burden.

Appendix A

1. *Pelaes*

As to the conspiracy charge against Pelaes, the evidence included proof that Serrano had threatened Freddy with harm to his family if the cocaine were not returned; that Pelaes, Lastre-Parrada, and others were then recruited by Serrano in Miami, Florida, to help in the recovery of the cocaine; that Pelaes flew from Miami to Los Angeles for that purpose; that ten days prior to the abduction of Luis, Serrano, Pelaes, and others purchased a van; that a few days prior to the abduction, Serrano and Lastre-Parrada reconnoitered the area around Luis's house; that, with Pelaes brandishing a gun, Luis was put into the recently purchased van and taken to a recently rented house, where Pelaes, Lastre-Parrada, and others kept Luis for some two weeks prior to taking him to New York; that numerous telephone calls were made to Luis's father demanding ransom for Luis; and that a number of the ransom-related calls were made by Pelaes. Lastre-Parrada testified at length about these events and about Pelaes's role in them. Most of the ransom calls, including those made by Pelaes, had been recorded, and the tapes were played for the jury.

It was the responsibility of the jury to consider all of the evidence and to determine whether the events constituted a kidnaping of Luis as the government contended, or merely a transfer of collateral as the defense contended, and whether the kidnaping was undertaken pursuant to a conspiracy. The proof was ample to permit a rational juror to conclude beyond a reasonable doubt both that there had been a conspiracy to kidnap Luis and that Pelaes was a member of it.

2. *Osorno*

Osorno's contention is that the evidence showed that he was a participant in neither the seizure of Luis nor the conspiracy to kidnap Luis. There was no evidence that Osorno had had any contact whatever with Freddy or Luis or Luis's father prior to Luis's abduction, and Osorno took the position at trial that he had been surprised at the abduction of Luis and had merely attempted to act as an intermediary to get Luis back. Section 1201(a) of 18 U.S.C., however, defines kidnaping to include not only abduction but "hold[ing] for ransom." Viewed in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80 (1942), the evidence was sufficient to permit the jury to infer that, in an effort to recover his cocaine, Osorno had joined the conspiracy and assumed a major role in the holding of Luis and the demand for the return of the cocaine in exchange for Luis's release.

The evidence as to Osorno's motive was ample. The missing cocaine had belonged to Osorno, and he had not been paid for it. Soon after its absence was discovered, Osorno went to Los Angeles to attempt to find Serrano and recover the cocaine. The evidence as to his acts in the later stages of the kidnaping included proof that after Luis was brought to New York, Osorno participated in the holding of Luis and instructed Luis's father with respect to the delivery of the ransom. Thus, Osorno telephoned Luis's home, told Luis's stepmother to go to a public telephone and call him back; when she did so, Osorno told her to have Luis's father "get everything ready," and he would call back with further instructions. Two days later, Osorno telephoned Luis's father and instructed him to fly to Newark, New Jersey, and to

"bring everything . . . and so that you can have the child"; Osorno gave Luis's father additional instructions upon his arrival in Newark and later in New York. Osorno was with Luis when, as Osorno and others tried to make the final arrangements for the exchange of Luis for the cocaine, the FBI agents seized Luis.

Whether or not Osorno was an original participant in the kidnaping, the evidence was sufficient to permit the jury to find beyond a reasonable doubt that at the later stages of the venture he was a participant in the conspiracy and the holding for ransom. Osorno's arguments as to the credibility of the witnesses and the inferences that might be drawn in his favor are arguments more properly addressed to the jury. The jury was entitled to reject these arguments, and we find no basis for upsetting its verdict.

CONCLUSION

We have considered all of defendants' arguments on appeal and have found them to be without merit. The judgments of conviction are affirmed.

APPENDIX B—JUDGMENT OF THE UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Docket No. S83 Cr. 00824-01(WK)

United States of America

vs.

ENRIQUE OSORNO

JUDGMENT AND COMMITMENT ORDER

	Month	Day	Year
In the presence of the attorney for the government AUSA MICHAEL KELLOGG, the defendant appeared in person on this date	07	11	85

X WITH COUNSEL | LAWRENCE KERBEN

FINDING AND JUDGMENT

There being a finding/verdict of X GUILTY on each of counts 1 and 2.

Defendant has been convicted as charged of the conspiring to kidnap and hold for ransom (Title 18, U.S.C., § 1201(c); Kidnapping for ransom in interstate commerce (Title 18, U.S.C., §§ 1201(a)(1) and 2).

SENTENCE OR PROBATION ORDER

Appendix B

TWELVE (12) YEARS on each of counts 1 and 2 to run concurrently.

CLERK IS DIRECTED TO ENTER AN APPEAL FOR THIS DEFENDANT.

s/ Whitman Knapp

WHITMAN KNAPP 7/12/85

FILED
AUG 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-7120 and 86-59

In the Supreme Court of the United States

OCTOBER TERM, 1986

FRANCISCO C. PELAES, PETITIONER

v.

UNITED STATES OF AMERICA

ENRIQUE JESUS OSORNO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-7120

FRANCISCO C. PELAES, PETITIONER

v.

UNITED STATES OF AMERICA

No. 86-59

ENRIQUE JESUS OSORNO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the admission into evidence of a statement made by petitioner Pelaes to a co-conspirator while Pelaes was in custody awaiting trial violated their Sixth Amendment right to counsel.

1. Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of kidnapping and conspiracy to kidnap, in violation of 18 U.S.C. 1201(a)(1) and (c). Petitioner Pelaes was sentenced to concurrent terms of 18 years' imprisonment. Petitioner Osorno was sentenced to concurrent terms

of 12 years' imprisonment. The court of appeals affirmed (Pet. App. 1a-14a).[1]

a. The evidence at trial established that petitioner Pelaes and several others kidnapped an 11-year-old boy and held him hostage for three weeks. The kidnappers demanded as ransom the return of seven kilograms of cocaine that they believed had been stolen from one of them by the boy's uncle (Pet. App. 3a-4a). Petitioner Osorno joined the conspiracy after the boy had been seized, and he thereafter played a major role in negotiating the return of the cocaine in exchange for the boy (*id.* at 13a-14a).

The kidnapping incident stemmed from a transaction in which petitioner Osorno sold 10 kilograms of cocaine on consignment to one Ramon Antonio Serrano. Serrano hired Freddy Almeida to transport the cocaine from Miami to Los Angeles. About two weeks after he received the cocaine, Serrano discovered that some of it was missing, and he asked Freddy for help in hiding the remaining seven kilograms. Freddy took Serrano to his father-in-law, Victor Jimenez, who agreed to store the cocaine in his attic. Thereafter, local police seized the cocaine and Jimenez disappeared. Serrano did not believe Freddy's report that the cocaine had been seized by the police, and he attempted to find Jimenez. Serrano threatened both Freddy and his wife in the course of his efforts to locate the missing cocaine. Meanwhile, Osorno was looking for Serrano, who had not yet paid for the cocaine. Pet. App. 4a, 10a-11a; Tr. 23-30, 39-40, 92-105, 109-111, 126-127.[2]

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[1]"Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 86-59.

[2]Citations to the trial transcript are taken from the government's brief in the court of appeals.

Serrano then traveled to Miami, where he enlisted the aid of petitioner Pelaes and four others, including Angel Lastre-Parrada. All six flew back to Los Angeles, where they made preparations to kidnap Freddy's nephew, 11-year-old Luis Almeida. Early in the morning of November 25, 1983, petitioner Pelaes, along with Lastre-Parrada and two others, grabbed Luis as he left his home. Pelaes held a gun to the boy's head, and the men put Luis in the back of a van, blindfolded him, and drove him to a house that Serrano had rented. Pet. App. 3a, 12a; Tr. 254, 322-334, 341-342, 345, 373, 439, 463-465, 468-469.

During extended negotiations for the return of Luis, petitioner Pelaes and others spoke several times by telephone with Luis's father, Carlos Almeida, threatening to kill Luis and demanding money and jewelry in addition to the seven kilograms of cocaine (GX 20J).[3] After Carlos told Pelaes that he had the drugs, Pelaes directed him to travel to the east coast to make the exchange (GX 20L). Petitioner Osorno also joined the conspiracy, first posing as a go-between for Carlos, but later directing the final details of the planned exchange in New York (GXs 20E, 20H, 20I, 20-O, and 20P). While the kidnappers were making a final telephone call to Carlos from a telephone booth in New York City, law enforcement agents rescued Luis and arrested the kidnappers (Tr. 455; Pet. App. 12a-14a).

b. After Lastre-Parrada pleaded guilty to the kidnapping and conspiracy charges and was sentenced on those charges, he sought to convey to his attorney that he was willing to testify for the government at the retrial of his

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[3]On November 28, 1983, the Federal Bureau of Investigation equipped the Almeidas' telephone with a recording device. Fifteen calls relating to Luis were recorded between November 29 and December 16, 1983 (GXs 20A-20P).

co-defendants (Pet. App. 7a).[4] Several weeks later, Lastre-Parrada was transferred to the Metropolitan Correctional Center (MCC) in New York City in order for prosecutors to discuss with him the possibility of his cooperation (*id.* at 8a). Before his return, the Assistant United States Attorney (AUSA) in charge of the case telephoned the MCC and told officials there that Lastre-Parrada would be arriving and should not be housed in proximity to the co-defendants who were awaiting trial. The AUSA thereafter wrote a letter to the MCC reiterating his instructions, and he then telephoned again to make sure his directions were understood. The AUSA was assured that MCC officials understood that Lastre-Parrada should be segregated. *Ibid.*

Notwithstanding the efforts of the AUSA, Lastre-Parrada was placed on the same floor of the MCC on which petitioner Pelaes and another co-defendant were housed. Thereafter, Pelaes and two others approached Lastre-Parrada and asked him to testify falsely if he was called as a witness at the upcoming retrial; specifically, they urged him to support Pelaes's contention that Carlos Almeida had consented to the taking of Luis as security for the return of the cocaine (Pet. App. 5a-6a). That conversation occurred before Lastre-Parrada had met with either his own lawyer or the AUSA (Tr. 292, 308).

c. Lastre-Parrada testified at trial about the details of the kidnapping and the roles played by both petitioners. In addition, he testified that Pelaes had asked him to testify falsely in support of Pelaes's defense theory (Pet. App. 4a).

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[4]Petitioners and others earlier had been tried and convicted on the same charges, but their convictions were reversed on appeal. See *United States* v. *Pedroza*, 750 F.2d 187 (2d Cir. 1984). At Lastre-Parrada's sentencing, the prosecutor had told Lastre-Parrada's attorney that the government would be interested in his cooperation at the retrial of the others (Tr. 304-307; Aff. of AUSA Paul Summit at 1).

The district court held a brief evidentiary hearing before admitting Lastre-Parrada's testimony about his conversation with Pelaes. After that hearing, the district court concluded that the Sixth Amendment did not bar the use of the testimony because the government had not sought to have Lastre-Parrada solicit statements from Pelaes, nor had it sought to have the two placed in proximity to one another in order to gather any unsolicited statements Pelaes might make (*id.* at 6a).

The court of appeals affirmed the convictions, rejecting petitioner Pelaes's Sixth Amendment claim (Pet. App. 6a-14a). Although the court of appeals observed that the Bureau of Prisons had erred in placing Lastre-Parrada in proximity to Pelaes in the MCC, it found "no error in the district court's ruling that the government did not intentionally create a situation likely to induce Pelaes to make incriminating statements without the assistance of counsel" (*id.* at 8a-9a).

2. Relying on *United States* v. *Henry*, 447 U.S. 264 (1980), petitioners contend (85-7120 Pet. 6-10; 86-59 Pet. 3-4) that the admission of Pelaes's statement to Lastre-Parrada violated their Sixth Amendment rights to the assistance of counsel. As an initial matter, even if Pelaes's Sixth Amendment rights had been violated, the use of Pelaes's statement would not have violated any Sixth Amendment rights of Osorno. The right to counsel is personal to each accused, and Osorno does not complain that any of his own statements were erroneously admitted at trial. In any event, however, there is no need to distinguish between the two petitioners, since it is clear that there was no Sixth Amendment violation even as to Pelaes.

As both lower courts recognized, this case is readily distinguishable from *Henry*. In *Henry*, the defendant's cellmate was already acting as a paid informant; he was known

by the FBI to have access to the defendant and to be able to engage him in conversations without arousing suspicion; he had been instructed by an FBI agent to be alert to any incriminating information he might hear; and he engaged in conversations and ingratiated himself with the defendant. 447 U.S. at 270-271, 274-275 & n.13. Furthermore, the court of appeals in *Henry* found that the informant had "deliberately used his position to secure incriminating information" (*id.* at 270). In these circumstances, the Court found that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel," the government had "deliberately elicited" the statements from him within the meaning of *Massiah* v. *United States*, 377 U.S. 201, 206 (1964), and thereby violated Henry's Sixth Amendment right to counsel. 447 U.S. at 274. See also *Maine* v. *Moulton*, No. 84-786 (Dec. 10, 1985), slip op. 13-14; *Kuhlmann* v. *Wilson*, No. 84-1479 (June 26, 1986), slip op. 21.

Most recently, in another case involving a jailhouse informant, the Court stressed that "the primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." *Kuhlmann* v. *Wilson*, slip op. 22. See also *Maine* v. *Moulton*, slip op. 16 ("knowing exploitation by the State of an opportunity to confront the accused without counsel being present"); *id.* at 17 n.13, quoting *United States* v. *Henry*, 447 U.S. at 277 (Powell, J., concurring) (" 'functional equivalent of interrogation' "). Accordingly, in order to establish a Sixth Amendment violation, "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann* v. *Wilson*, slip op. 22.

In this case, there was no action by the government that "was designed deliberately to elicit incriminating remarks." *Kuhlmann* v. *Wilson*, slip op. 22. To the contrary, according to the factual findings sustained by the court of appeals, the government had not yet concluded any cooperation agreement with Lastre-Parrada at the time Pelaes and others approached him about testifying falsely. The AUSA did not know that Lastre-Parrada had been housed in proximity to Pelaes and indeed had done "all that reasonably could have been expected to avoid the creation of such a situation" (Pet. App. 9a). As a result, unlike in *Massiah*, *Henry*, and *Maine* v. *Moulton*, the government had given Lastre-Parrada no instructions to gather incriminating information from Pelaes while they were housed together (Pet. App. 7a-8a).[5] Moreover, aside from the absence of deliberate conduct by the government, there is no indication that Lastre-Parrada "deliberately used his position" to secure incriminating information from Pelaes (*United States* v. *Henry*, 447 U.S. at 270). It was Pelaes and his two companions who approached Lastre-Parrada about testifying falsely.

It is also significant that Pelaes's statement was an attempt to have Lastre-Parrada commit the crime of perjury. A person has no right to the assistance of counsel in the commission or planning of a crime, and the Sixth Amendment therefore did not require the exclusion of Pelaes's statement for this additional reason. *United States* v. *Darwin*, 757 F.2d 1193, 1198-1200 (11th Cir. 1985), cert. denied,

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[5]To be sure, the Bureau of Prisons erred in failing to heed the AUSA's instructions not to house Lastre-Parrada with Pelaes. But there is no suggestion that this error was deliberate, much less that it was attributable to any design to procure incriminating statements from Pelaes. Such negligence in the internal operations of a prison or similar institution, while regrettable, violates no personal rights of the accused, who has no constitutional right to be segregated from particular inmates. Cf. *Kuhlmann* v. *Wilson*, slip op. 23 n.24.

No. 85-5360 (Jan. 27, 1986); *United States* v. *Moschiano*, 695 F.2d 236, 242 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983); *Grieco* v. *Meachum*, 533 F.2d 713, 718 & n.4 (1st Cir.), cert. denied, 429 U.S. 858 (1976); *United States* v. *Merritts*, 527 F.2d 713, 716 (7th Cir. 1975). Even if Pelaes's attorney had been present and the statements had been made to the attorney himself, they would not have been privileged from use at trial. *Clark* v. *United States*, 289 U.S. 1, 15 (1933).[6]

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1986

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[6]Petitioner Osorno also asserts in passing (86-59 Pet. 4) that the evidence against him was insufficient and that the disparity in the evidence against him and Pelaes was so great that he should have been granted a severance. The court of appeals, however, thoroughly examined the evidence against Osorno and found it amply sufficient, noting that the jury could have inferred that Osorno "assumed a major role" in the conspiracy (Pet. App. 13a-14a). The court's findings as to the strength of the case against Osorno are sufficient to rebut Osorno's claim that he should have been granted a severance.